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Supreme Court, U.S.
FILED
06-37 - JUL 5 - 2006
OFFICE OF THE CLERK

No.05A923

IN THE

SUPREME COURT OF THE UNITED STATES

Elizabeth A. Kalil,

Petitioner *pro se*,

v.

United States Department of Justice, *et. al.*,

Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Elizabeth A. Kalil
Petitioner *pro se*
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QUESTIONS PRESENTED

Federal regulating agency charged under 8 USC 1324b with adjudicating claims of employment discrimination and retaliation based on citizenship and national origin abandons requisite hearing, shielding both regulated U.S. employer and its unauthorized alien hire; and publicly defames U.S. citizen/whistleblower, deeming said *pro se* litigant's claims to be baseless, and imposes a fine on said whistleblowing employee of $52,958.40.

Whistleblower exercises right of judicial review by raising issues of agency's statutory and constitutional violations and seeking name-clearing hearing and *de novo* review before the circuit court.

1. Whether a reviewing court in the absence of the authentic agency record violates petitioner's rights, particularly of due process and liberty interest in one's good name, by ignoring petitioner's pleas for the accurate record and a name-clearing hearing and instead affirms an agency order that criminally defames and sanctions petitioner?

2. Whether the reviewing court's total disregard of both the agency's December 18, 2003 merits determination of petitioner's employment and discrimination claims and petitioner's plea for *de novo* review of said claims violates petitioner's constitutional guarantees of due process and equal protection?

3. Whether the Second Circuit's deference to and affirmation of agency actions in excess of agency authority unlawfully expands the agency's official powers beyond the congressional grant of 8 USC 1324b and its anti-retaliation provision?

4. Whether it is proper for a reviewing court, presented with a properly set-up petition for review, to allow the non-participation of the named respondent (whose injurious adjudicatory process is at issue) by substituting said named respondent with an Intervenor (who is alleged to be the discriminator/retaliator) without incurring prejudice against the petitioner?

5. Whether the Second Circuit erred in ruling petitioner's Rule 60B Fraud on the Court Motion and the documentary evidence substantiating same to be "without merit" ?

PARTIES TO THE PROCEEDING BELOW

The petitioner below and in this court is Elizabeth A. Kalil. The named respondent before the Second Circuit is The United States Department of Justice, Executive Office of Immigration Review, Office of the Chief Administrative Hearing Officer and The Utica City School District is the Intervenor.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App.34-36) is unpublished. The supporting opinions, August 3, 2004 (Pet. App. 1-2) January 20, 2005 (Pet. App. 3-4) and August 3, 2005 (Pet. App. 5-7) are unreported.

The agency's final order December 18, 2003 (Pet. App 8-31) OCAHO Case No. 02B00036 is published at http://www.usdoj.gov/eoir/OcahoMain/publisheddecisions/Looseleaf/Volume9/1103.pdf. and found at WL23318755.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 2005 (Pet. App. 34-36). A petition for rehearing/ rehearing en banc was denied on February 6, 2006 (Pet. App. 32-33). An application to extend the time to file a petition for writ of certiorari was filed on March 17, 2006 and on April 12, 2006 said application was granted extending the time to file until July 6, 2006. The jurisdiction of this Court is invoked under 8 U.S.C 1324b(i)(2)and 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE

Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury ...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the assistance for counsel for his defense.

Amendment XIII: "Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted."

Amendment XIV §1: "All persons born or naturalized in the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

8USC1324b Prohibition of discrimination based on national origin or citizenship status:
(1) It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment – (A) because of such individual's national origin, or (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

***

(5) Prohibition of intimidation or retaliation
It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or retaliated against shall be considered, for purposes of subsections (d) and (g) of this section, to have been discriminated against.

8USC1324a *et. seq.*

STATEMENT OF THE CASE

This case involves judicial scrutiny of the acts of a federal regulatory agency to determine whether said agency is acting within the scope of its express statutory authority and applying lawful processes and procedures in its adjudication of *pro se* complaints in compliance with statutory mandates and constitutional guarantees of equal protection and due process as set forth in the Fifth, Sixth, Eighth and Fourteenth Amendments.

This case also involves judicial scrutiny of a reviewing court's rubberstamp of the agency's constitutional violations and acts in excess of agency authority as presented it in- a petition for review and the effect the agency and reviewing courts actions have on both public policy as well as private individuals.

There is clearly law to apply to the agency's statutory and constitutional violations as explicitly and implicitly contained in its final order of December 18, 2003:
(i) abandonment of 8 USC 1324b's requisite evidentiary hearing on the record and its substitution with a statutorily and constitutionally deficient merits analysis;
(ii) imposition of excessive, unauthorized, unwarranted fine of $52,958.40; and
(iii)infliction of cruel and unusual punishment of an unauthorized, unwarranted published defamation.

There is also law to apply to the circuit court's:
(i) conscious avoidance of the agency's constitutional and statutory violations, total disregard of my plea for *de novo* review of my claims and request for a name clearing hearing as set forth in my petition for review.
(ii)acceptance of the named respondent's claim of nominalism and no-show/no-submit status, particularly as

the lawfulness of respondent's disparate adjudicatory process is at issue;
(iii)substitution of my named respondent with an Intervenor, whom I allege to be the retaliator, and whose alleged counsels do not pursue the interest of the public agency school district by their failure to file either a cross petition for review or application for enforcement to recover taxpayer's money, but instead continue the retaliation in the Second Circuit by parroting the agency's defamations of me.

Concominently, there is law to apply to the errors of the Second Circuit's review process that:
(i) proceeds on the presumption of my guilt;
(ii)assumes the agency actions are regular and due process was afforded, despite evidence to the contrary;
(iii)ignores the substantive issue of the agency's merits determination;
(iv)reviews absent the authentic agency record and denies my motion for the record by deeming it frivolous and inappropriate;
(v)fails to apply the plain language of the statute;
(vi)fails to review agency actions in context of the APA;
(vii)accords an administrative law judge Article III standing and deference on matters outside the narrow scope of his delegated area of expertise;
(viii)substitutes its judgment for that of the agency; and
(ix)supplements Congress' answer to unfair immigration-related employment practices so thoroughly as to render the statue meaningless.

1. IRCA, LEGISLATIVE HISTORY AND PURPOSE
In 1986, Congress enacted the Immigration Reform and Control Act (IRCA), which substantially amended the Immigration and Nationality Act (INA) by subjecting, for the first time, all U.S. employers to sanctions for knowingly

employing individuals unauthorized to work in the U.S. and hiring individuals without proper verification (8U.S.C. 1324a(a)(1), 1324a(b). Section 1324a(a)(1) further provides that it is unlawful for a person or other entity, after hiring an alien for employment, to continue to employ the alien in the U.S. knowing that the alien is unauthorized. 8USC1324a(a)(2). An employer who violates §1324a is subject to civil and criminal penalties. (8USC1324a(e)(4),(5); 8USC 1324a(f)(1)).

Section 102 of IRCA added a new provision, Section 274B, 8USC1324b, which is, in effect, a civil rights statute and prohibits employment discrimination on the basis of citizenship status or national origin. Specifically, an employer may not discharge or refuse to hire, recruit or refer a U.S. citizen or alien authorized to work in U.S. on the basis of citizenship status or national origin. The statute also prohibits retaliation or intimidation against the employee seeking to exercise his/her rights under this section.

Charges that a U.S. employer is engaging in unfair immigration-related employment practices are filed with the U.S. Department of Justice Office of Special Counsel (OSC), who is required to investigate and prosecute all such complaints (28 CFR 0.53; 8USC1324b(c)(2)). Complaints are to be heard by a specialized administrative law judge (ALJ) (8USC1324b(e)(2); AG Order No. 1243-87) in the U.S. Department of Justice Office of the Chief Administrative Hearing Officer (OCAHO, hereinafter "agency").

The ALJ presides at a public hearing on the record, as mandated by provisions of law enacted in IRCA and the Immigration Act of 1990 (5USC 554; 8USC1324b(e); 28 CFR68.39) and are conducted under applicable laws and

regulations and the Administrative Procedure Act (APA), 5 U.S.C., 551, et. seq.

Subsequent to the required public hearing on the record, the ALJ formally sets forth his findings of facts and conclusions of law and may impose sanctions and penalties on the U.S. employer as prescribed by law.

2. PETITIONER BEFORE THE AGENCY

February 2002: I, Elizabeth A. Kalil, native born U.S. citizen, commenced this agency action by timely filing with OSC charges of employment discrimination and on-going retaliation based on citizenship (8USC 1324b) and national origin discrimination (Title VII of the Civil Rights Act of 1964 as amended 42 U.S.C. 2000e) against my former employer, a New York State public agency, The Utica City School District (UCSD). (Pet. 2nd Cir. Brief 4)

May 2002: After investigating the charges, OSC issued its MEMORANDUM (Pet. 2nd Cir. Brief 5):

> Lila Oliver Alleyne, a non U.S. citizen was unable to comply with I-9 requirements because she was in the United States on a tourist visa. Nevertheless, at a special meeting of the [UCSD] Board of Education on September 5, 2000, Ms. Oliver was appointed as a probationary Spanish teacher... Regarding Ms. Kalil's employment as a substitute for Ms. Oliver and later as a "per diem" substitute" and temporary full-time teacher filling in for staff [Ms. Oliver], Ms. Kalil appears to have been treated unfairly because she was not offered the same pay and terms (probationary employment) an

> undocumented alien for whom UCSD applied for labor condition. UCSD's Personnel Director attested under penalty of perjury that the job it sought for Ms. Oliver was open to qualified U.S. workers when it was not. ...
>
> ***
>
> I recommend discussing with USCD's counsel the employer's responsibilities when it applies for permanent labor certification, and in particular, its duty to hire any qualified U.S. workers who apply, so that what happened to Ms. Kalil will not happen to anyone else.[1]

OSC refused to prosecute and ignored the ongoing retaliation against me.

September 2002: Based on OSC's issuance of the right to sue letter, I file a private action with agency in an attempt to get reinstated, awarded back pay, and having the ongoing retaliation stopped.[2]

September 2002: Agency issues Notice of Hearing.

November 2002: Hearing scheduled for July 7, 2003.

April 2003: Agency grants UCSD's substitution of in-house counsel, who states, among other things, he will be a witness at the hearing scheduled three months thence, with new, outside counsels to whom I object based on new counsels' conflicts of interest.

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[1] See, OSC Memorandum in its entirety Pet. 2nd Cir. Index 252-258.

[2] Following partial chronology of key factual events occurring in this matter and brought before reviewing court in prior pleadings.

September 25, 2003: Agency's *ex parte* telephonic prehearing conference with UCSD's counsels (while I am absent and hospitalized; agency on prior notice of same) wherein agency issues declarations/directives to employer's attorneys: my case dismissed with prejudice; UCSD is named the prevailing party entitled to attorney's fees; my pleadings are to be ignored and counsels are to file motion "so record is clear."[3]

October 9, 2003: Order denying my request for stay and recusal of ALJ.

October 16, 2003: Order issued "... Dismissing Complaint With Prejudice," which contains condition precedent calling for subsequent merits determination.

November 12, 2003: Order issued regarding Application For Attorney's Fees.

December 18, 2003: Final Order in which agency conducts "analysis of the merits of complainant's case"; imposes excessive, unauthorized unwarranted fine $52,958.40; and inflicts cruel and unusual punishment of unauthorized, unwarranted published defamation. (Pet. App. 8-31).

3. PETITIONER BEFORE SECOND CIRCUIT[4]
February 2004: I appeal to Second Circuit for relief of the agency's bad faith, reckless indifference to the facts and law before it, by raising issues of due process violations (Pet. App.37) and conclude my brief seeking the following:

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[3] See, Transcript Agency *ex parte* September 25, 2003 Conference Call Pet. 2nd Cir. Index 105-126; see too, Pet. 2nd Cir. Brief 5-6, 10-11

[4] Partial chronology of key factual events occurring in this matter and brought before the reviewing court in prior pleadings.

> [Repeating what was]...articulated by OSC *so that what happened to Ms. Kalil [Petitioner, pro se] will not happen to anyone else*...Petitioner appeals to this Court to: (1) provide a *de novo* review of Petitioner's national origin and citizenship status discrimination and retaliation claims; (2) provide Petitioner with a name-clearing hearing; (3) order the Agency to cease and desist from continuing to defame me in its publications; (4) grant declaratory judgment in favor of the Petitioner; and (5) provide Petitioner with any other relief this Court deems just and proper. (Pet. 2nd Cir. Brief 26)

April 26, 2004: U.S. Department of Justice Civil Division, Appellate Staff submits letter to Second Circuit:

> ...on behalf of the [agency], we would like to point out that the [agency] is merely a nominal respondent in this case, and will not enter an appearance or file briefs. The appropriate party to respond to the petition for review is the real party in interest, Utica City School District, which was the Respondent in the administrative proceedings ...
>
> ***
>
> While [the agency] is an appropriate respondent, it is a purely adjudicatory body with no interest in the outcome of this appeal...[but] will continue to distribute certified copies of the [agency] case file to all concerned parties...[T]he parties and the

> Court should continue to serve pleadings and court papers on the nominal respondent...[5]

August 3, 2004: Order threatening sanctions and denying my motions, submitted over the course of seven months, including request for authentic agency record.(Pet.App.1-2)

October 13, 2004: Order granting Intervenor's motion for a stay in my matter.

January 20, 2005: Order denying Intervenor's motion to strike my brief and appendix and dismiss my petition for review. (Pet. App 3-4)

February 7, 2005: With Intervenor's stay lifted, I file Rule 60B Motion for Fraud on the Court with documentary evidence of Intervenor's counsels' misrepresentation to the Second Circuit as to their employment/compensation in this matter by an unnamed third party who is prohibited by law from providing legal services to any NYS school district, as well as the agency's misrepresentation to the Second Circuit of its certification of the record submitted as being true and accurate, when it is not.

March 4, 2005: I file my Reply Brief. (see pg. 1 of said Reply, Pet. App.38)

July 7, 2005: Oral Argument: I am allotted five minutes; panel asks no questions, other than how to pronounce my name; Intervenor's counsel argues by attempting to persuade the panel of my alleged lawlessness.

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[5]See USDOJ letter, Pet. 2nd Cir. Index 283-284.

August 3, 2005: Summary Order affirms agency's actions and denies my Rule 60b Motion for Fraud on the Court as being "without merit." (Pet. App.5-7)

August 4, 2005: Amended Summary Order again affirms agency's actions, denies my Rule 60b Motion for Fraud on the Court as being "without merit" and denies outstanding motions as being "moot." (Pet. App.34-36)

September 14, 2005: I file Petition for Rehearing/Rehearing En Banc. (see pg. 1 of said Petition Pet. App.39-40)

February 6, 2006: Order denies my Petition for Rehearing/Rehearing En Banc. (Pet. App. 32-33)

REASONS AND ARGUMENT FOR ALLOWING THE WRIT

I come to this Court a U.S. citizen, *pro se* petitioner, teacher, whistleblower who has exhausted all remedies to both right the constitutional wrongs done me and to set to rights the manifestly absurd results the Second Circuit's review and resultant decision have on public policy.

This matter begs judicial enforcement of the mandate of 8 USC1324b and its anti-retaliation provision by striking down clearly unauthorized agency actions contravening specific prohibitions against discrimination and retaliation.

As it stands, the Second Circuit's rubberstamp has a chilling effect on public policy by its placement of its judicial imprimatur on the regulatory agency's disparate adjudicatory proceedings -- particularly with respect to *pro se* complainants -- without regard to the procedure and the rights due the parties. By leaving intact this kind of adjudication, U.S. employers are freed from liability and empowered to discriminate and retaliate at will.

The reviewing court's departure from the facts of the agency actions, from the accepted and usual course of judicial proceedings and well-settled principles of administrative law results in an egregious miscarriage of justice whose constitutional dimensions are neither fair, just nor right and whose remediation only this Court can effect.

I am a very unlikely litigant, considering all the rights, privileges and protections afforded me as a native-born U.S. citizen, former unionized New York State public school teacher and member of the protected class of workers 8 USC 1324b seeks to protect.

In 2000, my former U.S. public agency school district employer encumbered a unionized teaching position by knowingly hiring an unauthorized alien in the U.S. on a tourist visa and then deliberately subordinating me and my public employment to said unauthorized alien. This agency -- charged with regulating and penalizing U.S. employers who knowingly hire and continue to employ unauthorized aliens (8 USC 1324a) -- stated in its final agency order of December 18, 2003:

> [Petitioner] further claims that her action is well-founded because unspecified 'documentation'*shows that [school district] knew that Mrs. Lila Oliver-Alleyne was unauthorized to work in the United States when it appointed her to the full-time Spanish language teaching position in question.... However, her assertions regarding the alleged illegal hiring of Mrs. Oliver-Alleyne are irrelevant to the instant fee position issue; the issue is whether Respondent unlawfully discriminated against [Petitioner], not whether [school district] illegally hired an unauthorized alien...(Pet. App. 15-16); (compare to OSC Memorandum 3-4 herein).

*Documentation consisting of school district's official business records and court transcript evidencing school district's illegal hire and resultant discrimination, is contained in Petitioner's Preliminary Exhibit List submitted to agency on January 9, 2003; said List is attached to my Reply Brief submitted to Second Circuit on March 4, 2005.

On August 4, 2005, the Second Circuit affirmed the agency's final determination, thereby enabling the agency to disregard its statutory duties and the very charge under which the agency exists.

Importantly, the agency's determination withheld the requisite hearing on the matter, thereby further protecting the unauthorized alien who is not a part of the protected class (8 USC 1324a(h)(3); 8 USC 1324b (a)(1)); rewarding the employer school district with its fees; and depriving me -- or any other U.S. citizen-member of the protected class -- of statutory rights and constitutional guarantees.

In this matter, those constitutional guarantees are further eroded precisely because this agency morphed a civil, protected matter into a criminal one by recklessly disregarding the facts and law before it and imposing on me an unauthorized, unwarranted, excessive monetary fine of $52,958.40 and publishing about me a cruel, injurious, libelous, stigmatizing criminalization. I, the U.S. citizen, albeit *pro se*, should be accorded a presumption of innocence, not the presumption of guilt upon which the Second Circuit premised its judicial review in the absence of an authentic record and denied me any opportunity to defend myself from the criminal defamation despite my request for a name-clearing hearing.

Here, the affirmance of agency actions in excess of agency authority creates judge-made law, the consequences of which strongly deter any other victims of discrimination and retaliation from coming forward to exercise his/her rights in what is supposed to be a protected activity free from intimidation, threats, coercion or retaliation. (8 USC 1324b(a)(5)).

Second Circuit and agency disregard my due process and equal protection guarantees.

Allentown Mack Sales and Service, Inc. v. NLRB[1] holds:

> The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of 'reasoned decisionmaking.' Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.

Here, the agency actions fail to meet statutory, procedural and constitutional requirements (5 U.S.C.A§706 (2) (A) (B) (C)(D) 1964 ed. Supp. V), yet are affirmed by the Second Circuit to produce the ultimate, illogical, irrational result of making the statute meaningless. Moreover, as the agency's interpretation raises "substantial constitutional question[s]," [2] Chevron deference, accorded the agency by the Second Circuit, does not apply.[3]

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[1]*Allentown Mack Sales and Service, Inc. v. NLRB*, 118 S. Ct. 818(1998)quoting *Motor Vehicle Manufactures Assn. V. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962).

[2]*Ma. v. Ashcroft*, 257 F. 3d 1095, 1105 n.15 (9th Cir. 2001);see too, *Williams v. Babbitt*, 115 F. 3d 657, 661-63 (9th Cir. 1997) (discussing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 458 U.S. 568 (1988); and *Rust v. Sullivan*, 500 U.S. 173 (1991).

[3]*Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837,843 (1984).

The Second Circuit assiduously absents itself from any consideration of the constitutional issues I presented and the relief I sought from the agency's abandonment of its statutory duty -- the evidentiary hearing -- and substitution of coercive procedures lacking statutory and constitutional safeguards.[4] Instead, and in the absence of the named respondent and its opposition to/repudiation of my petition, the Second Circuit defers to the Intervenor and its counsels, whom I have consistently alleged to be retaliating against me, thereby throwing my rights to due process out the window.

Importantly, the Second Circuit also disregards this Court's two-step analytical framework for according due process rights found in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Matthews v. Eldridge*, 424 U.S. 319 (1976). The instant case satisfies both the *Roth* test (warranting due process protections) and meets the three-part test in *Eldrige* (balancing the potential liberty and property deprivations of the accused against the adjudicatory interests of the hearing body).

Most importantly, 8 USC 1324b is an "adversary adjudication" before an agency and plainly requires an evidentiary hearing on the record (5 U.S.C.A 504(b)(1)(C); APA§554; 8USC1324B(e); 28CFR68.39). Here, the agency abandons the hearing and substitutes the procedure due with its statutorily deficient merits analysis of December 18, 2003 (Pet. App. 12-19). In said self-styled merits analysis, which is the condition precedent cited in the agency's October 16, 2003 order, the agency delegates its impartial, objective, fact-finding function to the U.S. employer (regulated party), who, as the alleged retaliator, is

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[4] See, Petitioner's questions presented Second Circuit (Pet. App. 37); see too, Order Pet. App. 11-12 *pro se* cases without hearings.

anything but impartial and objective and whom the regulating agency affords Fifth Amendment protection from self-incrimination and accountability under 18 U.S.C. §1001.

The Second Circuit consciously avoids the agency's substantive errors of its December 18, 2003 merits analysis together with my request for a *de novo* review of my national origin and citizenship status discrimination and retaliation claims. Thus, like the agency, the circuit relies on the employer/Intervenor/retaliator's say-so.

The consequences of both the agency and reviewing court's decisions set civil rights back to the days of lords and vassals: specifically, U.S. employers (regulated party) are shielded from the scrutiny of a judicial trial-type proceeding -- i.e. one with witnesses under oath, cross examination and requisite process -- of their statutorily prohibited discriminatory and retaliatory employment practices. The lack of due process further victimizes U.S. workers (unregulated party) by depriving them of any possibility of reinstatement and back pay. None of the foregoing results were contemplated, imagined or enacted by Congress, as same are simply absurd.

The agency's ludicrous overreaching of its lawful parameters unquestionably strips me of my constitutional protections and convolutes a straightforward, civil, protected activity into a criminal one, in which area the agency lacks both expressed and implied authority. Because the Second Circuit affirmed this agency's disparate policymaking at the expense of *pro se* complainants, me and people like me are victimized twice over.

The absurdity, if not evil, of the respective decisions is succinctly addressed in *Allentown Mack, supra*:

> The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by the subordinate agency personnel (notably administrative law judges) and effective judicial review of the law by the Courts (827). An agency should not be able to impede judicial review, and indeed political oversight, by disguising its policymaking as fact finding (828).

It is only this Court who has the power to remedy these outrageous public wrongs.

Second Circuit rubberstamps agency actions inconsistent with statutory mandate, thereby frustrates congressional policy underlying 8 USC 1324a & b.

In *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974), this Court held that an appellate court is bound to "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. [5] Here, there is no question of retroactivity; it is a simple matter of the Second Circuit's being bound to apply 8 USC 1324b's unambiguous plain language in order to remedy the manifest injustice created by the agency's acts in this case.

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[5]See also, *Hutto v. Finney*, 437 U.S. 678, 694-695 n. 23 (1978); *Cort v. Ash*, 422 U.S. 66, 76-77 (1975); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281-282 (1969); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

As Chief Justice Marshall emphasized in *Schooner Peggy supra.*, "[W]ith great national concerns (as contrasted with 'mere private cases between individuals'), the court must decide accordingly to existing laws.[6] A great national concern herein lies with judicial regulation of this federal agency regulator, who decides matters of employment, and whose decisions, as a matter of law, are intended by Congress to keep the U.S. workplace free from discrimination and retaliation and U.S. workers who experience those evils free from coercion, threats and intimidation in a judicial setting.

In this case, the Second Circuit's affirmation further departs from this Court's basic tenants of administrative law as set forth in, for example, *NLRB v. Hearst Publications*[7] and *Unemployment Commission v. Aragon*,[8] as the courts are the final authorities on the issue of statutory construction [9] and are 'not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'[10]

Second Circuit errs in ignoring *in toto* Administrative Procedure Act and reviews agency actions under District Court standard of abuse of discretion.

There is a " strong presumption that Congress intends

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[6] *Dames & Moore v. Reagan*, 453 U.S. 654, 685 (1981).
[7] *NLRB v. Hearst Publications*, 322 U.S. 111,131 (1944).
[8] *Unemployment Commission v. Aragon*, 329 U.S. 143, 153-154.
[9] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).
[10] *NLRB v. Brown*, 380 U.S 278, 291. *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968) *SEC v. Sloan*, 436 U.S. 103 (1978).

judicial review of administrative action."[11] Congress means for the APA to provide a "simple and standard plan of administrative procedure" that responds to the "widespread demand for legislation to settle and regulate the field of federal administrative law and procedure" [12] and "to be operative 'across the board' in accordance with its terms, or not at all...[n]o agency has been favored by special treatment."[13]

While my Reply Brief to the circuit put it on notice of the APA, the circuit eschews the APA's specified standards and instead defers to the Intervenor's unspecified "...standards applicable to misconduct-based fee awards...and the appropriate standard of review applied to such awards..." (Intervenor's Brief 23).

The fact that the reviewing court shifts the applicable APA standard of review of agency action to the alleged retaliator's (Intervenor) standard is evidenced in its reliance on its two-cited cases, *Residential* and *Brinks* (Pet. App. 36). Unlike here, each case was afforded due process, either by jury trial or hearing and neither involved a claim of ongoing retaliation and request for name clearing hearing. Moreover, *Residential* is a District Court case, not an agency adversary adjudication. To the point, here the

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[11] *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670. (1986) *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991) "it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review," given the presumption "Congress legislates with knowledge of our basic rules of statutory construction".

[12] S Rep. No. 752, 79th Cong. 1st Sess. 1(1945), reprinted in Staff of Senate Comm. on the Judiciary, *Legislative History of the Administrative Procedure Act*, S. Doc. No. 79-248, at 187 (1946).

[13] H.R. Rep. No. 1980, 79th Cong., 2d Sess. 15(1946), reprinted in *APA Legislative History* 250.

Second Circuit's reliance on misconduct-based case law reflects an impermissible, prejudicial assumption on which the reviewing court depends in order to foreclose review. (Pet. App. 39)

Second Circuit affirms agency's (A) imposition of excessive unauthorized, unwarranted fine of $52,958.40, and (B) infliction of cruel and unusual punishment of an unauthorized, unwarranted published defamation.

In addition to constitutional prohibitions, the APA Sec.558(b) unequivocally states that no order may be issued and no sanction may be imposed except within jurisdiction delegated to the agency and as authorized by law.

This Court has held: that the executive branch is not permitted to administer a statute in a manner that is inconsistent with the administrative structure that Congress has enacted into law;[14] that the unambiguously expressed intent of Congress must be given effect by a reviewing court, as well as the administrative agencies;[15] that when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms" [16] – none of which were applied in this *pro se* case.

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[14] *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 108 S. Ct. 805 98 L.Ed. 2d 898 (1988).

[15] *Food and Drug Admin. V. Brown & Williamson Tobacco Corp.*, 529 U.S.1291, 146 L. 2d 121 (2000).

[16] *Lamie v. United States Tr,.* 124 S. Ct. 1023, 1030 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.* 530 U.S.1. 6 (2000).

(A) Imposition of excessive, unauthorized, unwarranted fine of $52,958.40.

The fee shifting language of 8 USC 1324b(j)(4) is plain, simple and unambiguous with regard to the award of attorney's fees:

> In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact. (see too: 5 USC 504(a)(b))

While the Second Circuit's decision acknowledges the statutory standard and the ALJ's admission of deviation from same (Pet. App. 36), the panel fails to scrutinize the lawfulness of the ALJ's deviation from the statute (Pet. 2nd Cir. Petition for Rehearing/EnBanc 9-10).This reviewing court also explicitly cloaks this ALJ with the inherent discretionary powers of an Article III judge (Pet. App. 36) and implicitly condones his assumption of the powers of an Article III judge (which he is not), as stated in his own words:

> ... I exercise my inherent power to manage litigation and my discretion under Rule 37 to grant [employer's] Application for Attorney's Fees (Pet. App. 25)...Pursuant to Rule 37 of the FRCP and my inherent powers under the Administrative Procedures Act and the OCAHO rules of practice, I order Complainant to pay Respondent $52,958.40 in attorney's fees (Pet. App.30).

Based on the foregoing, the circuit appears to have again listened to the Intervenor's argument "...all statements contained in the order are absolutely privileged" (Intervenor's Brief 28) -- the logical inference of which is that excessive fines are permissible. However, law forecloses the exaltation of ALJs to Article III standing and should not shield their decisions from meaningful judicial review. The scope of this ALJ's authority is narrowly limited to speak to employment discrimination matters; he is neither a District Court Judge nor a District Attorney; he is employed to be an unbiased, impartial fact finder.

The reviewing court also impermissibly embellishes its rubberstamp of the agency order by adding section "(b)" to what the ALJ clearly identified only as "Rule 37" (Pet. App. 36). In addition, the Second Circuit is unmindful of 8 USC 1324b's strict silence on the matter of the imposition of a monetary fine for alleged discovery misconduct, as well as this Court's holding in *Burns*:[17]

> 'Not every silence is pregnant.' In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective....An inference drawn from congressional silence certainly cannot be credited when it is contrary to all textual and contextual evidence of congressional intent.

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[17] *Burns v. United States*, 501 U.S. 129, 136 (1991) quoting *Illinois Dep't of Public Aid v. Schweiker* 707 F. 2d 273, 277 (7th Cir. 1983).

The Second Circuit also ignores *Whitman*:[18] "Congress ...does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions - it does not hide elephants in mouseholes." Here, the Second Circuit's affirmation is a transparent attempt to foreclose judicial review by artificially creating ambiguity in a clearly unambiguous statute (regarding the requisite hearing and possible attorney's fees) in order to hide its elephant named "Deference" in a mousehole of its own making. That wrongful deference attempts to legitimize the circuit's review. Either way -- and notwithstanding the Second Circuit's non-issuance of an enforcement decree -- it costs me.

Completely contradicting the excessive fine foisted on me for alleged discovery misconduct are the words of the very same ALJ who imposed the $52,958.40 fine on me. Said information was provided the Second Circuit in my Petition For Rehearing\Rehearing En Banc (8-9):

> The Chief Administrative Hearing Office (CAHO) previously ruled that neither the CAHO nor an Administrative Law Judge is empowered by the Rules of Practice to impose a monetary sanction on a party or attorney for misconduct...*Toussaint v. Tekwood Ass.* 6 OCAHO 892, 809 (1997)
>
> ***
>
> OCAHO is not an Article III court but a creation of Congress and is an administrative court or tribunal. It is part of the Executive Branch not the Judicial

[18] *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

> Branch...[and thus] would not be considered a "court of the United States" within the meaning of section 1927. Thus 28 U.S.C. section 1927 ...does not grant me the power to award attorney's fees. *Hsieh v. PMC-Sierra, Inc.* 9OCAHO 1091, 4-7 (2003)...

The agency's written standard is clear. It is equally clear that the agency failed to apply that standard in my case, and that the reviewing court failed to judicially scrutinize the agency's deviations.

> (B) Infliction of cruel and unusual punishment of an unauthorized, unwarranted published defamation.

Concomitantly, the reviewing court's decision -- beginning with its "[F]amiliarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues" -- inflicts on me the Second Circuit's threshold, substantive, prejudicial errors: I am presumed guilty of "lawlessness"; I am not due the opportunity to defend myself; the agency's determination is independent of the controlling statute; the ALJ is due unfettered deference; and the agency's December order will therefore be labeled a "sanctions order" reviewed "...for abuse of discretion." (Pet. App. 35-36)

To the point: the reviewing court abused its own discretion precisely because its grasp of facts, context and issues are irretrievably foreclosed by its lack of review of the complete and authentic administrative record together with its total lack of any consideration of any of the facts and issues I presented -- most importantly my innocence.

The Second Circuit enforces its errors by blindly accepting the ALJ's unsubstantiated conclusory statements (such as,

"...it seems unlikely that [Petitioner's] retaliation claim would be successful" (Pet. App.19). Thus, the circuit's affirmation defies the long established holdings of *Bell* (an administrative order cannot stand where there are no findings in support of it)[19] and *Panama Refining* (the lack of an express finding cannot be corrected by saying that the finding exists by implication.)[20] The circuit's failure to secure the complete and unaltered agency record precludes it from lawful review under 8 USC 1324b and APA 706(2)(A),(E) and/or (F). That the circuit erred is made harshly apparent in its earlier denial of my motions, among others, to procure the agency record and hold a case management conference, which

> ...are denied because they either seek inappropriate relief or have no relevance to the disposition of this matter. Appellant is warned that future filings of frivolous motions, particularly motions that are outside of the realm of her petition for review and clearly crafted for the sole purpose of vexing and harassing the appellees, may result in sanctions being imposed against her. (Pet. App. 2)

Reviewing absent the authentic record is particularly egregious in light of the penal nature of the agency's charges, which require Courts to give much closer scrutiny to said acts.[21]

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[19] *Bell Lines, Inc. v. U.S.*, 263 F. Supp. 40 (S.D. W.VA. 1967).

[20] *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79, L. Ed. 446 (1935); *Atchison, T. & S.F. Ry. Co. v. U.S.* 295 U.S. 193, 55 S. Ct. 748, 79 L. Ed. 1382 (1935).

[21] See Petitioner's Brief 23 citing, *Kropp Forge Co. v. Secretary of Labor*, 657 F2d. 119, 122 (7th Cir. 1981).

Problems with this agency's records were evinced fifteen years earlier in *Tovar*, [22] another OCAHO case, but one where a dispositive motion was filed and there was no criminalization of the petitioner. In *Tovar*, the Ninth Circuit refused to affirm the agency's decision stating, "The ALJ in this case granted summary judgment without a proper factual record." Here, the circuit's lack of the agency record allows it to arrive at any conclusions it wants -- including, but not limited to: timeliness, non-mergence of orders, [23] lack of jurisdiction (to say nothing of this school teacher's purported lawlessness).

Unlike *Overton Park supra.*, this agency's adversary adjudication is judicial in nature, affords the statutory right to a hearing designed to produce a record to serve as the basis for judicial review -- none of which happened in my matter. Instead, both the agency and reviewing court abandoned the rules and resorted to criminal defamation, which serves as a significant impediment to my professional reputation in a teaching career requiring licensing and good moral character and forecloses additional and future employment opportunities, such as the practice of law. Simply put, I am deprived of my liberty and property interests in my good name and left to carry the myth of my alleged guilt.

The Second Circuit ignores *in toto* agency's December 18, 2003 merits determination. [24]

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[22] *Tovar v. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993).

[23] *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834,133 L. Ed. 2d 773,34 Ded. R. Serv. 3d 1 (1996).

[24] *SEC v. Chenery Corp.* 318 U.S. 80, 88 (1943) "judicial judgment cannot be made to do service for administrative judgment"; See too: *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)) a judgment upon the validity of the grounds upon which the [agency] itself based its actions , reviewing court to evaluate agency action based

The Second Circuit's conscious avoidance of the agency's merits analysis frees it to treat the agency's October order as the final order and the December order as an ancillary "sanctions order" (Pet. App. 35-36). The resultant prejudice counters, among others, *Chenery, supra*, wherein this Court held that judicial review of an administrative agency requires "a judgment upon the validity of the grounds upon which the [agency] itself based its actions."(88) That the circuit failed to do so forecloses my rights to judicial review.

The Second Circuit, like all federal Courts, is "...not free to 'supplement' Congress's answer so thoroughly that [8USC 1324b] becomes meaningless."[25]

Mobil Oil Corp. v. Higginbotham's supra. tempered approach to federal judge-made law recognizes Congress' "superior authority" in policymaking,[26] as well as a reviewing court's role in the constitutional scheme.[27] This Court's prior decisions have restricted the power of the lower federal courts to develop extensive bodies of judge-made administrative law.[28]

My brief put the Second Circuit on notice of constraints placed on a reviewing court -- from slipping into judicial inertia or rubberstamping agency decisions, particularly when the dominant issues, as here, involve significant

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solely upon the justification set forth by the agency. See too; Pet. 2nd Cir. Reconsideration/EnBanc Point V- orders timeliness and mergence (Pet. App 39)

[25] *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

[26] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).

[27] See, *Miles* supra at 32; see also *Bush v. Lucas*, 462 U.S. 367, 389 (1983) (Congress in a "far better position" to weigh the competing policy considerations than judiciary).

[28] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

matters of public policy and constitutional rights.[29] Nevertheless, in this case, public policy and constitutional rights are superceded by unlawful policy-making.

The Second Circuit's rubberstamp of and supplement to agency-made law defies *Leedom*:[30] "[t]his Court cannot lightly infer that Congress does not intend judicial protection of rights its confers against agency action taken in excess of delegated powers."

The consequence of this reviewing court's rubberstamp denigrates what is supposed to be a federally protected civil activity into an unprotected free-for-all. Well, not quite, as but one of the consequential absurdities of this judge-made law affords U.S. employers and their counsels an opportunity to make money in a manner violative of firmly entrenched civil rights and anti-retaliation dictum. Anyway you cut it, 8 USC 1324 a & b are rendered meaningless.

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[29] See Petitioner's 2nd Cir. Brief pg. 20 citing *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89,97 (1983) quoting *America Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *NLRB v. Brown* supra; *FTC v. Colgate-Palmolive Co., supra*; *Port of Jacksonville Maritime Ad Hoc Committee, Inc. v. United States Coast Guard*, 788 F. 2d 705, 708 (11th Cir.) (1986).

[30] *Leedom Et. Al. Members of the National Labor Relations Board v. Kyne*, 358 U.S. 184 (1958) see too: *Harmon v. Brucker*, 355 U.S. 579; *Stark v. Wickard*, 321 U.S. 288, *School of Magnetic Healing v. McAnnulty*, 187 U.S. 94.

CONCLUSION

Based on the foregoing, I summarize my reasons and argument for allowing the writ by first repeating what I presented to the reviewing court (Pet. 2nd Cir. Brief 25-26):

> The errors of fact and law committed by this Agency are perhaps best summed up by Justice Matthews who wrote for a unanimous Court in 1896:
>
> 'Though the law itself be fair on its face, and impartial in appliance, yet if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights the denial of justice is still within the prohibition of the Constitution.'[30]

The mandate of 8 USC 1324b has been silenced and its application disparately applied in this *pro se* case by public authority to the point that I have been denied justice. I come to this Court as a last resort, as it is the only judicial body who can restore and enforce the statute's mandate and right these manifest wrongs.

Elizabeth A. Kalil,
Petitioner, *pro se*

[30] *Yick Wo v. Hopkins*, 118 U.S. 356, 6 St. Ct. 1064, 30 L.Ed.256 (1886).

APPENDIX

3

FILE DATE:
JUL 5 2006

No.05A923 06-37

IN THE

SUPREME COURT OF THE UNITED STATES

Elizabeth A. Kalil,

Petitioner *pro se*,

v.

United States Department of Justice, *et. al.*,

Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

APPENDIX

Elizabeth A. Kalil
Petitioner, *pro se*
8 Old Willow Road
New Hartford, NY 13413
(315)735-8866

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U.S.D.O.J.
E.O.I.R., O.C.A.H.O.
02-B-00036
Barton, A.L.J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse at Foley Square, in the City of New York, on the 3rd day of August two-thousand four,
Present:

Hon. John M. Walker, Jr.
Hon. Ralph K. Winter,
Hon. Dennis Jacobs,
Circuit Judges.

Elizabeth Kalil,

Petitioner-Appellant,

v. 04-0623-ag

United States Department of Justice,
Executive Office for Immigration Review,
Office of the Chief Administrative Hearing Officer,

Respondent-Appellee.

Appellant, *pro se,* moves for this Court to: (1) issue a stay of an order imposing attorney's fees against appellant pending review of the administrative law judge's order; (2) refer the case to the Civil Appeals Management Plan; (3) compel appearance of the respondent; (4) take notice of adversary bankruptcy proceedings against her; (5) compel submission of the administrative record; (6) amend the docket to accurately reflect her prior submissions and provide an answer to a procedural question; (7) take notice of the

adjournment of an adversary proceeding; (8) expedite resolution of legal representational status of Appellant's counsel; (9) take judicial notice of various New York State laws; and (10) certify questions of law to the New York Court of Appeals. The Utica City School District moves to intervene in this action.

Upon due consideration, it is ORDERED THAT Appellant's June 2, 2004 submission is hereby deemed a motion but that Appellant's motion to amend the docket is otherwise denied. IT IS FURTHER ORDERED that the motion of the Utica City School District to intervene is granted. IT IS FURTHER ORDERED that all other motions are denied because they either seek inappropriate relief or have no relevance to the disposition of this matter. Appellant is warned that future filings of frivolous motions, particularly motions that are outside of the realm of her petition for review and clearly crafted for the sole purpose of vexing or harassing the appellees, may result in sanctions being imposed against her. The Clerk's Office will enter a briefing schedule.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: "s/_____"

U.S.D.O.J.
E.O.I.R., O.C.A.H.O.
02-B-00036
Barton, A.L.J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse at Foley Square, in the City of New York, on the 20th day of January two-thousand five,

Present:

Hon. Pierre N. Leval,
Hon. Chester J. Straub,
Hon. Robert A. Katzmann,
Circuit Judges.

Elizabeth Kalil,

Petitioner,

v. 04-0623-ag

United States Department of Justice,
Executive Office for Immigration Review,
Office of the Chief Administrative Hearing Officer,

Respondent,

Utica City School District,

Intervenor.

Intervenor moves to strike the petitioner's brief and appendix and dismiss the petition for review. Petitioner moves for reconsideration of this Court's October 13, 2004 order granting intervenor's motion for a stay of the briefing schedule pending decision on the motion to strike, and for the imposition of sanctions against the intervenor. Upon due

consideration, it is ORDERED that the motions are denied. The intervenor's brief and respondent's brief if any, are to be submitted within thirty days of entry of this order.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: "s/_____"

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT
SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse at Foley Square, in the City of New York, on the 3rd day of August two-thousand and five.

Present:

HON. RICHARD C. WESLEY,
HON. PETER W. HALL,
Circuit Judges,
HON. DAVID G. TRAGER, [1]
District Judge.

---

[1] The Honorable David G. Trager, Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Elizabeth Kalil,

Petitioner,

v. (04-0623)

United States Department of Justice,
Executive Office for Immigration Review,
Office of the Chief Administrative Hearing Officer,

Respondents,

Utica City School District, Intervenor.

Appearing for Petitioner: Elizabeth A. Kalil, New Hartford, NY, *pro se.*

Appearing for Intervenor: Miles G. Lawlor, Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., Syracuse, NY

Petition for review of an order of the United States Department of Justice, Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer ("OCAHO") (Barton, A.L.J.).

(1) **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND** (2) **DECREED** that the order of the OCAHO be **AFFIRMED.** (3) Familiarity by the parties is assumed as to the facts, the procedural context, and the (4) specification of appellate issues. After reviewing for abuse of discretion of OCAHO order (5) awarding attorney's fees as a sanction, we now affirm. (6) Petitioner's petition for review was untimely as to the final order of dismissal on October (7) 16, 2003 because the petition for review was not filed within sixty days thereof and the October (8) order does not merge with the December sanctions order so as to make the October order (9) appealable. As such, we only have jurisdiction to review the December 2003 order as to an (10) award of sanctions in the

form of attorney's fees. (11) The ALJ in this case expressly declined to award attorney's fees on the basis of 8 U.S.C. (12) § 1324b's provision for award of attorney's fees to a prevailing party. Instead, the ALJ awarded (13) attorney's fees on the basis of 28 C.F.R. § 68.1's reference to the Federal Rules of Civil (14) Procedure, justifying the award under Rule 37(b) as a sanction for failure to comply with (1) discovery requests and orders. We review such orders for abuse of discretion. *See* 5 U.S.C. § (2) 706(2); *Residential Funding Corp. v. Degeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002); (3) *see also, Brink's Inc. v. Herman*, 148 F. 3d 175, 178-79 (2d Cir. 1998). (4) Where, as here, petitioner failed to comply with the ALJ's discovery orders and now (5) provides only the vaguest of references to any attempted compliance, we do not find any abuse of (6) the ALJ's considerable discretion over sanctions of this sort. (7) Accordingly, for the reasons set forth above, the judgment of the OCAHO is hereby (8) affirmed. (9) We have also considered petitioner's Rule 60(b) motion and find it to be without merit (10) and it is therefore denied.

(11) For the Court

(12) Roseann B. MacKechnie, Clerk

(16) By: "s/_____"

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF
ADMINISTRATIVE HEARING OFFICER

ELIZABETH A. KALIL, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 02B00036
UTICA CITY SCHOOL DISTRICT, Respondent	)	Judge Robert L. Barton, Jr.

ORDER GRANTING IN PART RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES
(December 18, 2003)

I. INTRODUCTION

On November 12, 2003, Utica City School District (Respondent) filed an Application for Attorney's Fees (Application) and on November 17, 2003, filed a Supplemental Application for Attorney's Fees (Supplemental Application). Respondent seeks $54,454.40 in attorney's fees at the rate of $136 per hour for 400.40 billable hours. In response, Elizabeth A. Kalil (Complainant), acting pro se, filed a Verified Response in Opposition to Respondent's Application for Attorney's Fees (Response) on December 1, 2003. For the reasons discussed in this Order, I grant Respondent's Application in part and award attorney's fees in the amount of $52,958.40.

II. BACKGROUND

By Order dated October 16, 2003, I granted Respondent's request to dismiss with prejudice Complainant's Complaint, in which she alleged that Respondent fired her and refused to rehire her on the basis of national origin discrimination, citizenship status

discrimination, and retaliation in violation of 8 U.S.C. § 1324b. Order Dismissing Complaint With Prejudice, 9 OCAHO Ref. No. 1101, 2003 WL 22519503. Although this Order assumes familiarity with the background and procedural history of this case, which is recounted in detail in the Order Dismissing Complaint With Prejudice, the following is a summary of my findings that are most relevant to the Application currently sub judice.

In the Order Dismissing Complaint With Prejudice, I concluded that Complainant willfully and deliberately abused the litigation process and defied my Orders. In that Order, I concluded that Complainant's disobedience was both deliberate and willful. Id. at 14, *14. I also concluded that "Complainant is a lawless litigant who has abused the litigation process, including discovery, for the improper purpose of harassing Respondent." Id. at 11, *10. I further concluded that "Complainant has taken an obstructionist posture since the onset of this case" by opposing nearly every motion filed by Respondent, including routine matters such as requests for extension of time. Id. at 12, *11. "After a year of overseeing this litigation, and having been somewhat lenient with Complainant because of her pro se status," I determined that she "used discovery to vex and harass Respondent and its counsel." Id. at 13, *12. I also found that Complainant "deliberately and willfully failed to comply with my Orders," despite repeated warnings that such behavior could result in dismissal. Id. at 14, *14. In particular, Complainant failed to comply with my Orders to provide documents to Respondent, to answer Respondent's interrogatories, and to cooperate with Respondent in scheduling her deposition. Id. at 15-16, *14-15. I also concluded that she had failed to obey my Orders to refrain from making ex parte telephone calls to my office except to discuss routine scheduling matters. Id. at 16, *14-15. Accordingly, I dismissed Complainant's Complaint with prejudice because she repeatedly and deliberately refused to

respond to or comply with my Orders and instructions. Id. at 17, *16.

The Order further provided that if Respondent wished to move for attorney's fees, it must file, by November 12, 2003, an application for fees, supported by an itemized statement and a memorandum of law discussing the applicable legal principles (i.e., relevant OCAHO and federal court case law). Id. Complainant, in turn, could serve and file a response within twenty days from the date Respondent's application was served. Id.

On November 12, 2003, Respondent filed the Application that is the subject of this Order, including an itemized statement setting forth the legal services performed on behalf of Respondent and the amount of fees incurred. Also, on that date, I issued an Order stating that because Respondent's Application was served on Complainant by Federal Express on November 10, 2003, and the twenty-day period of time for filing a response would expire on Sunday, November 30, 2003, Complainant's response had to be served and filed not later than December 1, 2003. Respondent then filed a Supplemental Application on November 17, 2003, in which it slightly modified its computation of fees. Complainant filed and served a timely Response on December 1, 2003.

III. OCAHO STANDARDS FOR AWARDING ATTORNEY'S FEES

Once a case involving allegations of unfair immigration-related employment practices has been adjudicated, the "prevailing party" may recover reasonable attorney's fees if the losing party's argument was "without reasonable foundation in law and fact." 8 U.S.C. § 1324b(h) (1994); 28 C.F.R. § 68.52(d)(6) (2002). Any application for attorney's fees must be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed. 28 C.F.R. § 68.52(d)(6) (2002).

The burden is on the prevailing respondent to substantiate the two-prong test of § 1324b(h), and that burden is especially heavy where the complainant has proceeded pro se. Toussaint v. Tekwood Associates, Inc., 6 OCAHO 784, 808-809, 1996 WL 670179 at *17-18. The prevailing respondent also bears the burden of showing that the requested attorneys fees are reasonable in amount. Id. at 809. *18.

The Office of the Chief Administrative Hearing Officer (OCAHO) precedent clearly establishes that a respondent who receives a dispositive ruling in his or her favor is a "prevailing party" under § 1324b(h), even in cases that terminated before an adjudication on the merits. See, e.g., Morales-Delgado v. Weld County School District, 2 OACHO 653, 654-655, 1991 WL 531890 at *1. By way of illustration, one relevant case held that the respondent was the "prevailing party" where the Court dismissed the complaint of a pro se complainant for failure to comply with an order to file a pleading to clarify omissions and contradictions in the complaint. Gallegos v. Magna-View, Inc., 4 OCAHO 359, 361-362, 1994 WL 386824 at *2-3. Similarly, another case held that the respondent was the "prevailing party" where the Court dismissed the pro se complainant's complaint for bad faith, failure to comply with discovery requests, and failure to comply with orders, even though there was never an adjudication on the merits. Palancz v. Cedars Medical Center, 3 OCAHO 503, 516-517, 1992 WL 535580 at *10.

In determining whether the losing party's argument was "without reasonable foundation in law and fact" under § 1324b(h), OCAHO judges have looked by analogy to Title VII jurisprudence. Monda v. Staryhab, 8 OCAHO 86, 100, 1998 WL 745960 at *10. The Supreme Court has held that a court may "in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without

foundation, even though not brought in subjective bad faith." Id. (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)). Moreover, "if a plaintiff is found to have brought or continued such a claim in *bad faith,* there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." Christiansburg at 422 (emphasis in the original). "[T]he fact that a case is resolved without having reached the confrontational evidentiary phase of the hearing process does not preclude a finding that a party's argument is without reasonable foundation in fact or in law." Palancz at 517, *10.

Respondent has not cited any OCAHO cases actually awarding fees on the basis that a party's argument was without "reasonable foundation in law and fact" in the absence of a hearing on the merits or a ruling upon a dispositive motion, such as a motion for summary decision. For example, the judge in Gallegos declined to hold that the complainant's complaint lacked "reasonable foundation in law and fact" where the Court dismissed the action because of the complainant's failure to comply with an order to redraft the complaint. Gallegos, supra, at 362-363. *3. Although the complaint was unclear on its face, the judge reasoned that it could be speculated that the pro se complainant possessed standing to allege a prima facie case of liability under 8 U.S.C. § 1324b(h). Id. at 362. *3. Thus, the respondent failed to meet its burden of showing that the complaint lacked a "reasonable basis in law and fact." See id. The judge in Palancz suggested the complainant's argument was without "reasonable foundation in fact or in law," but withheld an award of fees as a matter of discretion, recognizing the relative resources and communication skills of the parties. Palancz, supra, at 517-518, *10.

IV. ANALYSIS OF THE MERITS OF COMPLAINANT'S CASE

In seeking an award of attorney's fees against Complainant under 8 U.S.C. § 1324b(h), Respondent bears

the burden of showing that it was the "prevailing party." See Morales-Delgado, supra. Respondent argues that it is the "prevailing party" because Complainant's Complaint was dismissed with prejudice, Application at 6, and Complainant does not refute this claim in her Response. As noted previously, there are a number of cases holding that a respondent is the "prevailing party" when the complainant's case is dismissed before an adjudication on the merits. See, e.g., Morales-Delgado; Palancz; Gallegos, supra. In this case, I dismissed Complainant's Complaint with prejudice before reaching a hearing on the merits because she engaged in abusive motion and discovery practices and repeatedly refused to respond to or comply with my Orders and instructions. Order Dismissing Complaint With Prejudice, supra at 17, *16. **Therefore, I find that Respondent is the "prevailing party" in this case.**

Respondent further asks me to find that the Complaint lacks "reasonable foundation in law and fact." In evaluating the merits of the Complaint, it is first necessary to outline the elements that Complainant would have had to prove to establish a prima facie case of liability with respect to her failure to hire, discriminatory discharge, and retaliation claims. Since both parties are located in the state of New York, circuit court case law from the United States Court of Appeals for the Second Circuit governs. See 28 C.F.R. § 68.52 (2002). OCAHO judges have looked to Title VII jurisprudence for guidance in ruling upon claims of discrimination filed under 8 U.S.C. § 1324b. See, e.g., Walker, et al. v. United Airlines, Inc., 4 OCAHO 791, 1994 WL 661279.

Complainant's burden of establishing a prima facie case of liability is a "minimal" one. Graham v. Long Island Railroad, 230 F.3d 34, 38 (2d Cir. 2000) (citing Saint Mary's Honor Center v. Hicks, 509 U.S., 502, 506 (1993)); see also Ste. Marie v. Eastern Railroad Association, 650 F.2d 395 (2d Cir. 1981) (citing McDonnell Douglas Corp. v. Green,

411 U.S. 792 (1973)). With respect to her failure to hire claim, Complainant would have had to show that (1) she belongs to a protected group; (2) she applied for a position for which she was qualified; (3) despite her qualifications, she was rejected; and (4) after her rejection the position remained open and the employer continued to seek applicants with her qualifications. McDonnell Douglas Corp. at 802; Byrnie v. Town of Cromwell, Board of Education, 243 F.3d 93, 101 (2d Cir. 2001). With respect to her discriminatory discharge claim, Complainant would have had to prove that (1) she is a member of a protected class: (2) she was performing her duties satisfactorily; (3) she was discharged; and (4) that her discharge occurred under circumstances giving rise to an inference of discrimination on the basis of her membership in the protected class. Graham (citing McDonnell Douglas Corp.). Finally, with respect to her retaliation claim, she would have had to show that (1) she was engaged in a statutorily protected activity; (2) the employer was aware of her participation in the protected activity; (3) the employer took adverse action against her; and (4) a casual connection existed between her protected activity and the adverse action taken by the employer. Raniola v. Bratton, 243 F.3d 610, 624 (2d Cir. 2001); Cruz v. Able Service Contractors, Inc., 6 OCAHO 144, 150-151, 1996 WL 229220 at *5. Courts consistently have liberally construed remedial anti-retaliation provisions to encompass a broad range of conduct. Cruz at 155, *8.

Respondent argues that Complainant's action lacked "reasonable foundation in law and fact" because Complainant could not possibly have established a prima facie case of liability with respect to any of the three claims in her Complaint. See Application at 6-17. As to the failure to hire claim, Respondent claims that it only employed Complainant as a substitute teacher and a temporary teacher of Spanish, and that her active employment with Respondent ended shortly before her Temporary Teaching License expired by its terms on August 31, 2001. Id. at Exhibit A

(Affidavit of James R. Salamy, Director of Personnel for Respondent). Respondent also states that Complainant never applied for or made inquiry about the full-time Spanish language teacher position in question. Id. Respondent further states that Complainant was unqualified for the full-time position because she lacked the requisite permanent teaching certification from the New York State Education Department, and moreover, she has never obtained such certification. Id. Lastly, Respondent avers that it never hired anyone, regardless of their immigration or nationality status, to fill the full-time position. Id. Complainant does not dispute or address these sworn statements by Mr. Salamy.

Complainant offers little in her Response to demonstrate that her Complaint does indeed have a "reasonable basis in law and fact." The Response contains numerous unsupported attacks against the integrity of Respondent and its counsel, and also makes some irrelevant and unsupported arguments. First, Complainant suggests that Respondent and its counsel have wrongfully withheld documents that she requested through discovery and pursuant to the Freedom of Information Act (FOIA). See Response at 2-3. Presumably, Complainant believes that if she engages in even more discovery and document production, she will eventually uncover facts that prove her case to be well-founded in law and fact. Yet, she ignores the fact that she was allowed to conduct substantial discovery. In dismissing her Complaint, I noted that she willfully and deliberately abused the discovery process by inundating Respondent with discovery requests, to which they invariably responded, while at the same time she failed to respond to Respondent's own discovery requests! Order Dismissing Complaint With Prejudice, supra, at 11, *10. Therefore, I reject any suggestion that Complainant is now unable to articulate a "reasonable basis in law and fact" with respect to her Complaint because Respondent somehow impeded her discovery efforts.

Complainant further claims that her action is well-founded because unspecified "documentation" shows that Respondent knew that Mrs. Lila Oliver-Alleyne was

unauthorized to work in the United States when it appointed her to the full-time Spanish language teaching position in question. Response at 3-5. However, her assertions regarding the alleged illegal hiring of Mrs. Oliver-Alleyne are irrelevant to the instant fee petition issue; the issue is whether Respondent unlawfully discriminated against Complainant, not whether Respondent illegally hired an unauthorized alien. For this reason, the case law cited by Complainant concerning actions brought under 8 U.S.C. § 1324a, which establishes a process for sanctioning employers who unlawfully hire aliens who are unauthorized to work in the United States, is inapposite. See id. at 2, 4-5 (citing United States of America v. Jonel, 8 OCAHO 175, 1998 WL 804705; New El Ray Sausage Co., Inc. v. INS, 925 F.2d 1153 (9th Cir. 1991); United States of America v. Café Camino Real, Inc., 2 OCAHO 29, 1991 WL 531736).

Complainant also argues that the Office of Special Counsel for Immigration-Related Unfair Employment Practices's (OSC) issuance of a right-to-sue-letter, OCAHO's issuance of a notice of hearing, and this Court's administration of the case demonstrate that her Complaint is well-founded in law and fact. See id. at 7-9. However, this position reflects a fundamental misunderstanding about the functions of OSC, the Chief Administrative Hearing Officer (CAHO). and this administrative tribunal. Once OSC determines it will not prosecute a case, it is required by law to issue a right-to-sue letter within the statutory time period, 8 U.S.C. § 1324b(d)(2) (emphasis added), and the CAHO must accept any complaint which colorably alleges a discrimination claim over which we have jurisdiction. Moreover, the presiding judge can only rule upon the merits of the case in a final order or when one of the parties files a dispositive motion, such as a motion for summary decision. Since no adjudicative hearing was held and no dispositive motion was filed in this case, I find that the right-to-sue letter, the notice of hearing, and my administration of the case have no bearing on whether Complainant's action has a "reasonable basis in law and fact."

Complainant further asserts that she has been prejudiced in bringing her case because the telephone prehearing conference of September 25, 2003, was improperly noticed or unreasonably convened. Response at 6. Yet, Complainant received adequate notice, by telephone and in writing, that the prehearing conference would take place at 1 p.m. on September 25, 2003, and that dismissal of her Complaint was a possible sanction should she fail to appear. See Notice of Telephone Prehearing Conference, served on September 23, 2003, by facsimile and first class mail; Order Dismissing Complaint With Prejudice, supra, at 9, *8-9. Although Complainant maintains that "she was being treated in a hospital emergency room" on the morning of September 25, 2003, Response at 6, to this date she has not provided me with a scintilla of evidence that she was treated in a hospital on the morning of the conference, and if she were, how long she was there, whether she was admitted as a patient, when she left the hospital, and why her unidentified malady prevented her from attending the conference in the afternoon. If she were treated at a hospital, there would be written records of the same, but she has not provided any written evidence to me. Also, she has not provided the name of the hospital or physician, or stated for what malady she was treated. Therefore. I reject Complainant's claims that the September 25, 2003, conference was improperly convened.

Complainant also takes the position that I dismissed her Complaint during the September 25, 2003, conference. See id. at 6, 16. Yet, I did not dismiss her Complaint until I issued the Order Dismissing Complaint With Prejudice on October 16, 2003. During the conference, I stated that Complainant might be able to convince me to reconsider my decision to dismiss. PHC Tr. 19. In an Order issued on October 6, 2003, eleven days after the conference took place, I ordered Complainant to serve and file her answers to Respondent's interrogatories not later than October 14, 2003, and I warned her that if she did not do so, I might grant Respondent's motion for sanctions. After Complainant disobeyed this Order, I then noted in dismissing her

Complaint that if she had immediately filed her answers and indicated her intention to comply with my orders in the future, I probably would not have granted Respondent's motion. Order Dismissing Complaint With Prejudice, supra, at 17, * 16. However, if it is truly Complainant's position that I did dismiss her Complaint on September 25, 2003, I note that any petition for appeal of my Order Dismissing Complaint With Prejudice would have had to have been filed in the Second Circuit on or before November 24, 2003, which is 60 days from September 25, rather than December 15, 2003, which is 60 days from October 16. Sec. 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.57 (2002).

Finally, Complainant asserts that if Respondent believed that her Complaint lacked "reasonable foundation in law and fact," it had an obligation to file a dispositive motion that would swiftly end this case and stop the accrual of legal fees. Response at 10-11. However, Complainant fails to acknowledge that she may have impeded such efforts by refusing to respond to Respondent's discovery requests and by failing to comply with my Orders to do so. Therefore, I reject her argument that Respondent's failure to file a dispositive motion precludes a finding that her Complaint lacks "reasonable basis in law and fact."

In summary, Complainant has promulgated no facts in her Response suggesting that Respondent ever discriminated against her in any way. Moreover, in her Response Complainant has not refuted Mr. Salamy's statement that Complainant never applied for the position of full-time Spanish language teacher with Respondent, that she was and is uncertified to be a full-time teacher in New York State, and that Respondent never hired Mrs. Oliver-Alleyne or anyone else to fill the position. Thus, Complainant could not possibly establish a prima facie case of liability with respect to her failure to hire claim, because she never applied for a position for which she was qualified, and attendantly, she was never subject to any adverse employment decision, much less one occurring under circumstances giving rise to an inference of discrimination. See Byrnie, supra. Likewise, she cannot prove a prima facie case of liability for a

discriminatory discharge from a job that Respondent never hired her to fill. See Graham, supra. Finally, even under the broad construction traditionally afforded to anti-retaliation provisions, it seems unlikely that Complainant's retaliation claim would be successful. See Raniola, supra, at 624; Cruz, supra, at 155, *8. Complainant was not an employee of Respondent when she filed her Charge with OSC and her Complaint with OCAHO, she never applied for the full-time position of teacher with Respondent, and she has nowhere alleged that Respondent impeded her attempts to gain subsequent employment with another school because she filed a Charge and a Complaint. Thus, nothing in the record suggests that Respondent retaliated against Complainant during or after her period of temporary employment Respondent. **Accordingly, I find that Complainant has not provided the Court with evidence establishing that her Complaint has a "reasonable basis in law or in fact."**

Nevertheless, I am not prepared to assess attorney's fees against Complainant on this basis. The undisputed facts in Mr. Salamy's affidavit demonstrate that Respondent has made a strong showing that the Complaint lacked "reasonable foundation in law and fact." In addition, Complainant's abusive motion and discovery practices suggest that she filed this action in bad faith. See Christiansburg, supra ("if a plaintiff is found to have brought or continued such a claim in *bad faith,* there will be an even stronger basis for charging him with the attorney's fees incurred by the defense") (emphasis in the original). However, in prior OCAHO cases, judges have not awarded fees against a complainant on the ground that a complaint lacked "reasonable foundation in law and fact" in cases where the complainant's case was dismissed before an adjudication on the merits, see, e.g., Palancz; Gallegos, supra, and the burden on Complainant to establish a prima facie case of liability is a "minimal" one. See Graham, supra. Although these prior decisions by other judges are not binding precedent and Respondent makes a strong case that Complainant's Complaint lacked any "reasonable foundation in law and fact," I have not made a prior ruling on this issue.

Without such a ruling, I will not presume that Complainant would have been unable to establish a prima facie case of liability with respect to at least one of the claims in her Complaint, even though she has failed to do so in her Response. **Therefore, because there was no prior finding that Complainant's Complaint lacked "reasonable foundation in law and fact," I do not award attorney's fees on this basis.**

V. SECOND CIRCUIT CASE LAW ON ATTORNEY'S FEES IN ACTIONS NOT DECIDED ON THE MERITS

As stated previously, because both parties are located in the state of New York, circuit court case law from the United States Court of Appeals for the Second Circuit is pertinent. See 28 C.F.R. § 68.52 (2002). Relevant case law establishes that when a party commits misconduct during the discovery process, a court may impose sanctions on the party under its inherent power to manage its own affairs. Residential Funding Corporation v. DeGeorge Financial Corp., 306 F.3d 99, 106-107 (2d Cir. 2002). When acting pursuant to this inherent power, the court has broad discretion in fashioning the appropriate sanction. Reilly v. Natwest Markets Group, Inc., 181 F.3d 253, 267 (2d Cir. 1999). A number of courts have determined that an award of attorney's fees is the proper sanction in cases where the plaintiff's action was dismissed as a result of the plaintiff's bad faith, vexatious litigation conduct, or refusal to obey the orders of the tribunal. See Sterling Promotional Corp. v. General Accident Insurance Company of New York, 212 F.R.D. 464,470 (S.D.N.Y. 2003); Fonar Corporation v. Magnetic Resonance Plus, Inc., 935 F.Supp. 443, 448 (S.D.N.Y. 1996) (assessment of attorney's fees when the opposing party has acted in bad faith, vexatiously, or for oppressive reasons); Alvarado v. Manhattan Worker Career Center, 2003 WL 194203 (S.D.N.Y.) (Title VII case).

In addition, the OCAHO rules of practice specifically state that the Federal Rules of Civil Procedure (FRCP) may be used as a general guideline in any situation not provided for by the OCAHO rules of practice, the Administrative

Procedure Act, or any other applicable statute, executive order, or regulation. 28 C.F.R. § 68.1(2002). In pertinent part, the FRCP provide that when a party disobeys an order to be sworn for his deposition or to answer a deposition question, "the court *shall* require the party failing to obey the order... to pay the reasonable expenses, including attorney's fees caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Residential Funding Corporation, supra, at 106 (quoting Fed. R. Civ. P. 37(b)). This rule places the burden on the disobedient party to avoid expenses by demonstrating that the failure to comply is justified or that special circumstances make an award of expenses unjust. Selletti v. Carey, 173 F.3d 104, 110 (2d Cir. 1999) (quoting Rule 37(b) advisory committee note (1970 amendment)). Likewise, the judge may assess these same sanctions against a party who fails to attend his own deposition or to serve answers to interrogatories. Fed. R. Civ. P. 37(d). The judge has broad discretion to order sanctions under Rule 37, and may consider (1) the wilfulness of the non-compliant party or the reason for the noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of non-compliance; and (4) whether the non-compliant party had been warned of the consequences of his non-compliance. Nieves v. City of New York, 208 F.R.D. 531, 535 (S.D.N.Y. 2002) (citing Bambu Sales, Inc. v. Ozak Trading. Inc., 58 F.3d 849 (2d Cir. 1995)). Non-compliance may be considered willful, as here, "when the court's orders have been clear, when the party has understood them, and when the party's non-compliance is not due to factors beyond the party's control." Id. at 536 (quoting Bambu Sales, Inc. at 852-853). Moreover, it is not necessary to file a formal application to obtain relief under Rule 37, and a court may treat a request for dismissal as its equivalent. Alvarado v. Manhattan Worker Career Center, 2002 WL 31760208 (S.D.N.Y.) at *6 (citing Gilpin v. Philip Morris International, Inc., 2002 WL 1461433 (S.D.N.Y.)).

Complainant's behavior in this case mirrors that of the plaintiffs in Sterling and Alvarado, who also refused to

provide discovery or to obey the judges' orders. In Sterling, the plaintiff, who was the president and "probably the only possible witness" of Sterling Promotional Corporation "repeatedly and deliberately evaded any effective discovery sought by defendant Travelers" over a period of two years. Sterling, supra, at 465. Even after the Court issued an order compelling the plaintiff to attend his deposition, the plaintiff failed to comply. Id. Consequently, the Court then granted the defendant's motion to dismiss, noting that "parties and counsel have no absolute right to be warned that they disobey court orders at their peril." Id. at 469 (citing Reilly v. Natwest Markets Group, Inc., 181 F.3d 253 (2d Cir. 1999) (internal quotations omitted)). The Court further emphasized that the plaintiff's ongoing efforts to avoid his deposition had prejudiced the defendant's ability to defend against the claim. Id. Even though the case never reached an adjudicative hearing on the merits, the Court awarded attorney's fees to the defendant under its inherent power and Rule 37 because the plaintiff "acted in bad faith and vexatiously with regard to not appearing at Court-ordered depositions." Id. at 470.

In Alvarado, the Court assessed attorney's fees against a Title VII plaintiff who failed to respond to the defendant's discovery requests and various orders of the Court requiring him to do so. Alvarado v. Manhattan Worker Career Center, 2003 WL 194203 (S.D.N.Y.) (Order Granting Attorney's Fees). Although this case was decided on summary judgment, it is analogous to a decision not on the merits for the following reasons. In a hearing on the defendant's Rule 37 application, the Court found that sanctions against the plaintiff were appropriate because he had failed to produce documents to the defendant, had failed to comply with two orders requiring him to do so, and thus had prevented the parties from abiding by the deposition schedule established in an earlier order. Alvarado v. Manhattan Worker Career Center, 2002 WL 31760208 (S.D.N.Y.) (Order Granting Summary Judgment) at *4-7. Yet, the Court declined to dismiss the plaintiff's action because he had not received clear notice that dismissal was a possible sanction for his

misconduct, as required by relevant Second Circuit precedent. Id. at *7 (citing Nieves, supra, at 535). Instead, the Court ordered that the evidence sought by the defendant through its discovery requests be precluded and invited the defendant to file a motion for summary judgment, id., which it then granted. Id. at *15. In adjudicating the defendant's subsequent application for fees, the Court found that the plaintiff's failure to comply with the three Orders was willful and in bad faith. Alvarado v. Manhattan Worker Career Center, 2003 WL 194203 (S.D.N.Y.) at *1. The Court further noted that the plaintiff had engaged in "egregious conduct" and numerous "dilatory tactics [that] significantly prolonged and substantially increased the cost of this litigation." Id. Therefore, the Court granted the defendant's application for attorney's fees under its inherent power to manage its own affairs and under Rule 37. Id. at *1-2 (citing Residential Funding Corp., supra.

Complainant in this case also engaged in egregious conduct. See Order Dismissing Complaint With Prejudice, supra, at 11-17, * 10-16. Complainant has "wilfully and deliberately" ignored my Orders to provide documents to Respondent, to answer Respondent's interrogatories, and to cooperate with Respondent in scheduling her deposition, as well as another Order not to contact my office by telephone except to discuss routine scheduling matters. 14. at 14, * 14-15. At the same time, even though Respondent responded to most of her pleadings and invariably responded to her numerous discovery requests, Complainant failed to answer Respondent's own discovery requests, including Respondent's First Set of Interrogatories and Respondent's Demand for Production of Documents, which were served on Complainant on May 13, 2003, and has failed to cooperate with Respondent in scheduling her deposition. In summary, Complainant has behaved as "a lawless litigant who has abused the litigation process, including discovery, for the improper purpose of harassing Respondent," id. at 11, *10, and has "used discovery to vex and harass Respondent and its counsel." Id. at 13, *12. Under relevant Second Circuit case law, this willful misconduct alone would justify

granting Respondent's Application. See Sterling; Alvarado (Order Granting Attorney's Fees); Nieves, supra.

Moreover, certain additional factors have further convinced me that I should grant the Application. First, I note that Complainant is not an unsophisticated litigant. She is a schoolteacher with a college education. Her father is an attorney in Utica, New York, and he has had some contacts with Respondent's attorneys. See Prehearing Conference Report, Aug. 12, 2003, at 2 (the Respondent was "amenable to having the [Complainant's] deposition in Utica at Complainant's father's law office"); Appendix of Supplemental Application (describing conversations and correspondence with W. Kalil, Esq., Complainant's father, regarding the scheduling of Complainant's deposition). Thus, although she acted pro se, Complainant received some counsel from her attorney father and should have been familiar with the American justice system. In other words, the misconduct in this case was not the result of innocent missteps by an unsophisticated pro se litigant; it was the result of Complainant's deliberate and protracted willful behavior. Also, during the lawsuit she learned, from an OSC Memorandum that she received in response to a FOIA request, that her Complaint may not have been filed in a timely manner. See Complainant's Notice to Take Deposition of Carol J. Mackela, Esq. Upon Oral Examination (August 7, 2003) at Exhibit F1 (letter from Complainant to OSC in which she refers several times to the OSC Memorandum). Moreover, Complainant should have been on notice from the onset of these proceedings as to the questionable merits of her case because Complainant never applied for the position and because Respondent never hired anyone to fill the full-time Spanish language teacher position on which she has based her entire Complaint. See Application at Exhibit A (Affidavit of James R. Salamy). These factors reenforce my conclusion in the Order Dismissing Complaint With Prejudice that she brought this case in bad faith for the sole purpose of vexing and harassing Respondent, and I further find that it would frustrate the interests of justice to require Respondent to bear the cost of

defending such a baseless action. **For these reasons, I exercise my inherent power to manage litigation and my discretion under Rule 37 to grant Respondent's Application for Attorney's Fees.**

VI. DETERMINATION OF FEES

In its Application and Supplemental Application, Respondent has listed the attorneys who worked for it on this case, the date on which their legal services were provided, the nature of their services, the amount of hours they billed, and the hourly rate they charged. In-house counsel Donald R. Gerace, Esq., represented Respondent in this matter for over a year, between February of 2002 (when Complainant filed her Charge Form for Unfair Immigration-Related Employment Practices with OSC) and March of 2003, but Respondent has elected not to seek attorney's fees for Mr. Gerace's services. Application at 19. Respondent seeks attorney's fees for legal services rendered by the law firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. (Ferrara firm), which has represented Respondent in this matter from March of 2003 until the present. Id. The Ferrara firm charged Respondent **$136 per hour** for legal services rendered by Henry F. Sobota, Esq., and Donald E. Budmen, Esq., who are partners, and Miles G. Lawlor, Esq., who is an associate with over twelve years of employment discrimination-related experience. Id. In total, Respondent requests attorney's fees in the amount of ***$54,454.40,*** reflecting **400.40** billable hours. Appendix of Supplemental Application.

Complainant contests the Application for Attorney's Fees on several grounds. First, Complainant avers that she is a school teacher with limited financial resources, although she does not ask me to mitigate any award of attorney's fees against her on the basis of inability to pay. See Response at iii. Nevertheless, the Second Circuit has stated that "fee awards are at bottom an equitable matter," and courts should consider the relative wealth of the parties in assessing the size of an award. Faraci v. Hickey-Freeman Company, Inc., 607 F.2d 1025, 1028 (2d Cir. 1979) (Title VII case); see also Toliver v. Sullivan, 957 F.2d 47,49 (2d Cir. 1992). Along these lines, the court should ascertain whether in light of the

plaintiff's ability to pay, a lesser sum would fulfill the deterrent purpose of the pertinent fee-shifting provision. Faraci at 1029.

The plaintiff's "degree of good faith in prosecuting the action" is a key part of this analysis. Id. Here, Complainant has provided no documentation supporting her claim that she has limited financial resources or that she would be unable to pay the attorney's fees. Moreover, her behavior in this case does not comport with such a claim. Of her fifty-one filings in this case, each of which had to be served on opposing counsel and this Court, Complainant paid extra money for expedited mail service (e.g., United States Postal Service (USPS) Express Mail, USPS Overnight Mail, and certified mail) thirty-five times. Neither my Orders nor the rules of practice required such expedited service. Further, such expedited service was unnecessary to meet a deadline because Complainant was aware that the OCAHO rules of practice permit the service of a pleading by facsimile to toll the running of a filing deadline, provided that the pleading is sent at the same time by ordinary mail to all parties entitled to service. See 28 C.F.R. § 68.69(c) (2002). Complainant also paid for the professional videotaping of the deposition of David F. Bruno, which she conducted on September 17, 2003. Complainant's Verified Submission of Deposition Video Tape (With Exhibits) of David F. Bruno: [New York State Freedom of Information Law Records Access officer; and Clerk of the Board of Education of the Utica City School District and Utica City School District Clerk] and Request of This Court to Take Official Judicial Notice of Same [sic], Sept. 24, 2003, at 1-2.

Even were Complainant able to show financial hardship, I still would be inclined to award the requested amount of attorney's fees because she litigated this case in bad faith. See Faraci, supra, at 1028. Even if a litigant were destitute, he or she must be held fully accountable for behaving as a lawless litigant who runs up the opposing party's legal bills by abusing the discovery process, by refusing to obey the orders of the tribunal, and by filing unnecessary motions. Because Complainant behaved in this

manner and has not proven financial hardship, I decline to mitigate the award of attorney's fees against her because of her alleged financial status.

Complainant also alleges that the Ferrara firm double-billed for its services in this case because it also represents the Oneida-Herkimer Board of Cooperative Educational Services (BOCES). See Response at 16. Yet, Complainant has not established any nexus between Respondent and the BOCES, and has not shown that the Ferrara firm billed the BOCES for the services performed in the lawsuit. Complainant has adduced no proof that the BOCES, which is not a party to this suit, has incurred any legal fees as a result of her filing of a Charge with OSC or a Complaint with OCAHO. Accordingly, I reject Complainant's argument that the Ferrara firm double-billed for its services in this matter.

Complainant also contests the reasonableness of specific fee requests of Respondent. First, Complainant argues that it was unreasonable for Respondent's counsel to bill for telephone conferences with my law clerk, because such conversations constituted ex parte communications in violation of my Orders prohibiting such communications. Id. In my past Orders, I stated that ex parte communications by telephone with my office were prohibited, except for the purpose of scheduling conferences or hearings. See Order Regarding Ex Parte Communications, Nov. 8, 2002 (emphasis in the original); Order Regarding Ex Parte Communications, Oct. 6, 2003 (emphasis added). On September 15, 2003, and September 23, 2003, my law clerk initiated contact with Mr. Lawlor by telephone to schedule a telephone prehearing conference for September 25, 2003, at 1:00 p.m, Eastern Standard Time. No substantive matters were discussed during these calls. In fact, my law clerk had similar telephone conversations with Complainant on those same dates for the sole purpose of scheduling the conference, but she nonetheless failed to appear when the conference took place. Thus, since no improper ex parte communications occurred during the conversations between my law clerk and Mr. Lawlor, I reject Complainant's

argument that it was unreasonable for Respondent's counsel to bill for the time spent on these telephone calls.

Next, Complainant contends that her Complaint was dismissed during the telephonic conference of September 25, 2003, and therefore, any billable hours incurred after that date are unreasonable. Response at 16. Yet, as discussed above in the section of this Order entitled "Analysis of the Merits of Complainant's Complaint," this assertion is patently wrong. Her Complaint was not dismissed until I issued the Order Dismissing Complaint With Prejudice on October 16, 2003. Accordingly, I reject her assertion that any time billed by Respondent's counsel after September 25, 2003, is unreasonable.

In contrast, Complainant's objection to fees related to defense of a possible appeal by Complainant to the Second Circuit is well taken. See Response at 16. Fees incurred as to a possible appeal have no relation to the basis for dismissal of this administrative action. Moreover, I do not have jurisdiction over appellate matters, and any application for fees incurred in defending an appeal must be directly presented to the court of appeals.

Respondent has included time spent on appellate matters as follows: (a) on September 25, 2003, Mr. Lawlor researched the appeal process; (b) on September 26, 2003, Mr. Budman held a telephone conference with Mr. Salamy regarding appeal rights; (c) on September 26, 2003, Mr. Lawlor researched a possible Second Circuit appeal; and (d) on September 29, 2003, Mr. Lawlor researched appeal standards. Appendix of Supplemental Application. Each of these items appears in a separate paragraph in the Appendix alongside other billing items that would have been reasonable standing alone. See id. In these paragraphs, Respondent has not designated exactly how much time was expended on appellate matters, but has instead requested a total of eleven hours in attorney's fees for the entire set of activities. . Id. Since the prevailing party bears the burden of showing that the requested attorneys fees are reasonable, Toussaint, supra, at 809, *18; Pino v. Locascio, 101 F.3d 235, 237 (2d Cir. 1996), I am not at liberty to estimate how

much time was devoted to the appeal process, as opposed to reasonable billing matters. Therefore, I find that the entire eleven hours ($1,496.00) requested in the four sections of the Appendix including appeal-related matters should be rejected. Thus, after deducting the $1,496.00 from the $54,454.40 sought by Respondent, the amount remaining is $52,958.40.

Except for the above-mentioned items, Complainant has nowhere in her Response disputed the nature of the services rendered by the Ferrara firm, the number of hours submitted by Respondent, or the hourly fee. After reviewing the remaining entries in Respondent's itemized statement of fees, I find that the nature of the services rendered and the time expended is reasonable. I further note that a reasonable fee should be awarded for the preparation and defense of an application for fees. Weyant v. Okst, 198 F.3d 311, 316 (2d Cir. 1999); Bonner v. Guccione, 2000 WL 12152 (S.D.N.Y.) (Title VII case). A culpable party should not be permitted to cause the erosion of fees awarded to the prevailing party for time spent in obtaining the favorable judgment by requiring additional, uncompensated time to be spent afterwards. Weyant at 316. Accordingly, Respondent is entitled to compensation in the amount of $6,813.60, reflecting 50.10 hours spent in preparing its Application and Supplemental Application at the hourly rate of $136.

Complainant also has not contested the reasonableness of the hourly rate. The current prevailing hourly rates generally applied in the region in which the parties are located are "$175.00 for civil rights attorneys with significant experience and numerous years of practice, $125 for associates with four or more years of experience, $100 for newly admitted attorneys, and $65 for paralegals." Gatti v. Community Action Agency of Green County, Inc., 263 F.Supp.2d 496, 515 (N.D.N.Y. 2003) (age discrimination case). In this case, the Ferrara firm charged $136 per hour for the services of Mr. Sobota and Mr. Budmen, who are partners, and Mr. Lawlor, an associate who has been practicing employment discrimination law for more than twelve years. Application at 19. Considering that two of

these attorneys are partners and the other one has twelve years of experience in the field of employment discrimination, I find that an hourly rate of $136 is reasonable. I further note that while the Sterling and Alvarado cases arose in the Southern District of New York, the judges' approval of an hourly rate of $200, Sterling, supra, at 469-470, and $255, Alvarado, supra, 2003 WL 194203 at *2, in those cases underscores the reasonableness of the $136 rate currently sought.

For these reasons, I order Complainant to pay $52,958.40 in attorney's fees, reflecting 389.40 hours of legal services rendered by attorneys of the Ferrara firm in defense of this action at the hourly rate of $136. While this is a large fee to impose on a pro se litigant, it is not unprecedented. See, e.g., Wije v. Barton Springs/Edwards Aquifer Conservation District, 5 OCAHO 499, 531; 1995 WL 626204 at *25-26 (awarding attorney's fees against a pro se complainant in the amount of $51,530.34). More importantly, this fee is justified in light of Complainant's bad faith, willful and deliberate abuse of the discovery process, and refusal to obey my Orders. It would subvert the interests of justice to require Respondent substantially to bear the cost of defending against a suit that was brought for the sole purpose of harassment.

VII. CONCLUSION

Pursuant to Rule 37 of the FRCP and my inherent powers under the Administrative Procedures Act and the OCAHO rules of practice, I order Complainant to pay Respondent $52,958.40 in attorney's fees.

"s/ _____"
ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

Notice concerning Appeal

This Order constitutes a final agency decision. As provided by statute, no later than 60 days after entry of this

final order, a person aggrieved by such Order may seek a review of the Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.57 (2002).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
46 FOLEY SQUARE
NEW YORK 10017

Roseann B. MacKechnie
Clerk

Date:	2/2/06 [sic]
Docket	**04-0623-ag**
Short Title:	Kalil v. United State Department of Justice Execu
Agency Number:	02B00036
Agency:	Department of Justice

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 6th day of FEBRUARY two thousand six.

Elizabeth A. Kalil,
Petitioner,
v.
United State Department of Justice, Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer,
Respondents.
Utica City School District,
Intervenor.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Petitioner Elizabeth Kalil. Upon consideration by the panel that

decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: "s/_____"
Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT
AMENDED SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse at Foley Square, in the City of New York, on the 4TH day of August two-thousand and five.
Present:

HON. RICHARD C. WESLEY,
HON. PETER W. HALL,
Circuit Judges,
HON. DAVID G. TRAGER, [1]
District Judge

---

[1] The Honorable David G. Trager, Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Elizabeth Kalil,

Petitioner,

v. (04-0623)

United States Department of Justice,
Executive Office for Immigration Review,
Office of the Chief Administrative Hearing Officer,

Respondents,

Utica City School District, Intervenor.

Appearing for Petitioner: Elizabeth A. Kalil, New Hartford, NY, *pro se.*

Appearing for Intervenor: Miles G. Lawlor, Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., Syracuse, NY

Petition for review of an order of the United States Department of Justice, Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer ("OCAHO") (Barton, A.L.J.).

(1) **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND** (2) **DECREED** that the order of the OCAHO be **AFFIRMED.** (3) Familiarity by the parties is assumed as to the facts, the procedural context, and the (4) specification of appellate issues. After reviewing for abuse of discretion the OCAHO order (5) awarding attorney's fees as a sanction, we now affirm. (6) Petitioner's petition for review was untimely as to the final order of dismissal on October (7) 16, 2003 because the petition for review was not filed within sixty days thereof and the October (8) order does not merge with the December sanctions order so as to make the October order (9) appealable. As such, we only have jurisdiction to review the December 2003 order as to an (10) award of sanctions in the

form of attorney's fees. (11) The ALJ in this case expressly declined to award attorney's fees on the basis of 8 U.S.C. (12) § 1324b's provision for award of attorney's fees to a prevailing party. Instead, the ALJ awarded (13) attorney's fees on the basis of 28 C.F.R. § 68.1's reference to the Federal Rules of Civil (14) Procedure, justifying the award under Rule 37(b) as a sanction for failure to comply with (1) discovery requests and orders. We review such orders for abuse of discretion. *See* 5 U.S.C. § (2) 706(2); *Residential Funding Corp. v. Degeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002); (3) *see also, Brink's Inc. v. Herman*, 148 F. 3d 175, 178-79 (2d Cir. 1998). (4) Where, as here, petitioner failed to comply with the ALJ's discovery orders and now (5) provides only the vaguest of references to any attempted compliance, we do not find any abuse of (6) the ALJ's considerable discretion over sanctions of this sort. (7) Accordingly, for the reasons set forth above, the judgment of the OCAHO is hereby (8) affirmed. (9) We have also considered petitioner's Rule 60(b) motion and find it to be without merit (10) and it is therefore denied. In addition, we have considered all (11) other motions filed by petitioner and hereby deny them as moot.

(12) For the Court

(13) Roseann B. MacKechnie, Clerk

(16) By: "s_____"

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE I: As a matter of law, the Agency's interpretation of its public mandate as applied in its adjudication of 8 USC § 1324b in the matter of Elizabeth A. Kalil v. Utica City School District, September 4, 2002 through December 18, 2003, Agency Case 02B00036, violated Petitioner's constitutional rights of due process and, therefore, cannot be judicially sanctioned.

ISSUE II: As a matter of law, the Agency's opprobrious treatment of [Petitioner] Elizabeth A. Kalil proceeding *pro se* before the Agency in the matter of Elizabeth A. Kalil v. Utica City School District, September 4, 2002 through December 18, 2003 Agency Case 02B00036, violated Petitioner's constitutional rights of due process and, therefore, cannot be judicially sanctioned.

The facts and the law as applied to the facts of this matter do not justify the results of the Agency's final action. As herein below set forth, Agency action consistently exceeded and violated the authority and limitations imposed on it by Constitution; Title IV of the Civil Rights Act of 1964, 42 USC2000e et. Seq. [section 703]; The Immigration and Nationality Act (INA) as amended Immigration Reform Control Act (1986)(IRCA); Agency Rules of Practice and Procedure 28CFR Part 68.1 et. seq. having the force of law; and all other sources of law that are binding upon the Agency, including but not limited to New York State's threshold employment statues that inform and control NYS public school district's employment of public school teachers.

The Argument herein discusses the law and facts in context of a non-inclusive list of Agency Actions, which cannot be judicially sanctioned.

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Point I

Contrary to law, the panel erred by completely ignoring the issues raised by Petitioner, *pro se* in her Petition For Review – substantive constitutional violations of due process and deprivation of liberty interest

Point II

Contrary to law, the panel erred by sanctioning agency action in excess of statutory authority – 8 U.S.C. § 1324b does not authorize "*awarding attorney's fees* (**$52,958.40**) *as a sanction*" for "*...failure to comply with discovery orders and requests*"

Point III

As a matter of law, the panel erred by rubber stamping agency location, thus withholding meaningful judicial review. The panel's sole reliance on Residential Funding Corp. v. Degeorge Fin. Corp. 306 F.3d 99 (C.A.2) 2002 and Brink's Inc. v. Herman 148 F.3d 175 (C.A.2)1998 is clearly misplaced as neither case remotely conforms to the facts, procedural context or appellate issues presented in Petitioner *pro se's* Petition For Review

Point IV

As a matter of law, the panel erred in alleging the non-mergence of orders and thereby erroneously concluding the issues' of timeliness and the panels' lack of jurisdiction

Point V

Contrary to law, the panel erred by deeming Petitioner's Rule 60(b) – Fraud On The Court Motion "*to be without merit and it is therefore denied*" despite the law and direct evidence of the fraud contained therein

APPENDIX **21-23**
CERTIFICATE OF SERVICE **24**

Supreme Court, U.S.
FILED
OCT 2 6 2006
OFFICE OF THE CLERK

(2)

No.06-37

IN THE

SUPREME COURT OF THE UNITED STATES

Elizabeth A. Kalil,

Petitioner *pro se*,

v.

United States Department of Justice, *et. al.*,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

PETITION FOR REHEARING

Elizabeth A. Kalil
Petitioner, *pro se*
8 Old Willow Road
New Hartford, NY 13413
(315)735-8866

On October 2, 2006, this Court denied petitions for certiorari in over 1,850 cases, including the instant matter which was filed on July 5, 2006. Simultaneously, and on this October 2nd, this Court granted certiorari to two petitions[1] by vacating said judgments and remanding to the appropriate circuit for further consideration in light of this Court's ruling in *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. ____ (2006) (hereinafter referred to as "*Burlington*").

The intervening circumstances of a substantial or controlling effect not previously presented are the *Burlington* ruling of June 22, 2006 and the absence of both public agency Respondent and public agency Intervenor, both of whom chose not to defend the Second Circuit's affirmation of agency actions in excess of statutory authority or to challenge, oppose, refute, and/or dispute any of the law or facts presented by Petitioner in her Petition for Writ of Certiorari. Resultant consequences of the absence of *Burlington*, Respondent, and Intervenor trample Petitioner's Constitutional rights of due process, stigmatize her good name and thwart public policy by turning 8 USC 1324b and its prohibition of intimidation or retaliation provision (8 USC 1324b(5)) on its head.

Specifically:

1. The United States Solicitor General's Office on behalf of Respondent the United States Department of Justice, *et. al.*, submitted a waiver dated July 24, 2006, despite its duty to represent the United States' interests, including the interests of its citizens in their Constitutional guarantees and federal statutory protections.

[1] 05-1051 *Bussell, Meghan v. Motorola, Inc., et. al.*
06-81 *James, Maralyn S. v. Metro. Govt. of Nashville, TN*

2. The law firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., ("Ferrara Firm") alleged to be counsel for the Intervenor, Utica City School District, submitted a waiver dated July 26, 2006 with an attached cover letter to this Court claiming two discrete arguments: (i) "*... the Petition for Certiorari has absolutely no merit and is frivolous on its face*" and (ii) "*...due to financial considerations the District will not be submitting a response to the Petition ...*" .

However, this intervening New York State public agency neglects to state it has an operating budget of approximately $150 million and that the "Ferrara Firm" has been actively litigating an adversary proceeding against Petitioner in Bankruptcy Court for the last two years by relying on the invalid actions of the regulatory agency and the Second Circuit's unsubstantiated affirmation of same, which is a non-money judgment.[2]

3. While the Office of Special Counsel For Unfair Immigration-Related Employment Practices[3] (hereinafter "OSC") issued a Memorandum of Law finding Intervenor guilty of violating federal immigration law by dint of Intervenor's School Board's knowing hire of an unauthorized alien and subordinating native born U.S. citizen Petitioner-employee to said alien, at no time has OSC prosecuted the U.S. employer and/or ever timely

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[2] Petitioner has argued same before the Bankruptcy Court, but her pleadings have been ignored. She now awaits written certification of the non-money judgment from the Second Circuit.

[3] OSC is USDOJ's Civil Rights Division investigatory and prosecutorial office.

commenced an enforcement action of the agency's final order, which, unlike that of a District Court, is not self-executing.

While Petitioner was not burdened with a money judgment by the Second Circuit, that Court nonetheless affirmed the federal regulatory agency's egregiously outrageous, libelous, conclusory statements, to which Petitioner was denied the opportunity to be heard, and in which the Second Circuit proceeded without benefit of the accurate agency record and/or findings of fact and conclusions of law.

The manifestly unjust stigmatization -- initiated by the regulatory agency's Internet publication of its final order(s) - has effectively terminated Petitioner's public school teaching career and has negatively impacted on her economic wherewithal.

Basic common sense dictates that the Second Circuit's judgment is at issue. Neither I nor my Petition should be the target of stigmatization and ongoing-retaliation. As officers of the Court, counsels have a duty to come forward and defend what they know to be right and not do a disappearing act like the Solicitor General, nor throw stones and look for money like the Intervenor (and get paid from public coffers for doing so like Intervenor's counsels), nor defer to such unlawyerly conduct as this Court has implicitly done.

Like the Second Circuit, the counselors herein practice undue deference and are oblivious to Justice Scalia's dissent in *Mead*,[4] which points to the consequences of unjust deference as applied by the Second Circuit's affirmation of excessive regulatory agency action:

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[4] *United States v. Mead Corp.* 120 S. Ct. 2164 (2001)

> ...[*Mead*] is one of the most significant opinions entered by the Court dealing with the judicial review of administrative action. **Its consequences will be enormous, and uniformly bad**. (2188) [Emphasis added].

Here, the Second Circuit's affirmation is one of illegality that implicitly condones intimidation and retaliation resulting in "enormous and uniformly bad" consequences.

Like *Burlington*, this is also a discrimination and retaliation case in which Petitioner has clearly suffered harm from both the regulatory agency and Intervenor due to her conduct of coming forward with complaints of illegal employment practices. The interfering, retaliatory conduct particularly of Intervenor over the past six years would surely deter any reasonable U.S. employee from coming forward with similar complaints.

Importantly, unlike *Burlington* which involves private rights wherein due process was afforded, the instant matter involves public rights wherein due process was denied. First, the executive regulatory agency apparently believes that U.S. public employers and unauthorized aliens (whose activities in the public domain are funded by public monies) have federal protections far in excess of any Constitutional and federal statutory rights of any U.S. citizens/public employees. Secondly, the Second Circuit's affirmation completely ignores the agency's substantive merits determination (dated December 18, 2003), the condition precedent set by the agency, yet ironically deems as without merit Petitioner's Rule 60B motion and its documentary evidence refuting the ALJ's conclusory narrative/ final published order of December 18, 2003. As a result, U.S. citizens/public employees have neither rights to due

process nor liberty interest in their good name – outcomes resulting in "enormous and uniformly bad" consequences.

Specifically, the logical inference draw from the Second Circuit's illegal affirmation is that said decision has uniformly bad consequences for public rights/policy: the agency is free to continue to disregard the prescribed procedures of mandated formal adjudication; the agency and a reviewing Circuit Court need not pay a whit to either the clear language of the controlling statute nor said statute's unambiguous Congressional intent; the agency and the reviewing Circuit Court can simply ignore the agency's substantive rules to dispose of *pro se* complainants and their discrimination and retaliation complaints.

In context of the instant matter, the coupling of denial of due process with liberty interest is tantamount to judicially approved retaliation. Importantly, the public is left in the dark as the agency and judicial review of agency actions do not play by the rules clearly expressed in the controlling statute and its Congressional intent.

WHEREFORE; based on the foregoing petitioner prays this Court will right the illegalities in this matter by issuing an order that will:

1. require the U.S. Solicitor General to fully brief the issues presented in Petitioner's Writ of Certiorari or, in the alternative, require the U.S. Solicitor General to issue a Confession of Judgment;

2. vacate and set aside the Second Circuit's unsupported Amended Summary Judgment Order dated August 4, 2005;

3. grant Petitioner's relief as requested in her Petition for Review before the Second Circuit: *de novo* review of her

national origin and citizenship status discrimination and retaliation claims; provide Petitioner with a name-clearing hearing; require the agency to immediately cease and desist from broadcasting and publishing in any way, shape or form, including over the Internet, its final defamatory, stigmatizing orders in this matter; and grant declaratory judgment in favor of Petitioner;

5. vacate and remand Petitioner's matter, including Petitioner's Rule 60 B Motion for Fraud on the Court to the United States Court of Appeals for the Second Circuit for consideration in light of *Burlington*; and

6. provide such other relief as this Court deems just and proper.

Date: October 25, 2006

Respectfully submitted:

Elizabeth C. Kalil

Elizabeth A. Kalil
Petitioner, *pro se*
8 Old Willow Road
New Hartford, NY 3413
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TO:
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Utica City School District
C/O Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
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East Syracuse, NY 13057
Attn: Benjamin J. Ferrara, Esq.
phone: (315)437-7600

CERTIFICATION

I, Elizabeth A. Kalil do hereby certify that the instant Petition for Rehearing is limited to intervening circumstances of a substantial or controlling effect not previously presented; is presented in good faith and not for delay.

Elizabeth A. Kalil
Petitioner, *pro se*

Sworn and subscribed to
Before me this 25th
Day of October, 2006

Notary Public
County of: Oneida
Commission Expires: 3/15/08

JOHN A. READLING
Notary Public, State of New York
No. 02RE6106990
Qualified in Oneida County
Commission Expires March 15, 2008